Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1316

TURNER ELKHORN MINING COMPANY, ET AL.,

Appellants,

vs.

JOHN T. DUNLOP, SECRETARY OF LABOR and CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Kentucky

RESPONSE TO MOTION TO AFFIRM

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1. Appellants submit, for the reasons stated at pp. 8-11 of their motion to affirm in No. 74-1302, *Dunlop* v. *Turner Elkhorn Mining Co.*, that this Court's summary affirmance of the decision of the District Court for the District of Columbia in *National Independent Coal Operator's Association* v. *Brennan*, 372 F.Supp. 16, *aff'd*, 419 U.S. 955 (hereafter the *NICOA* case), affords no basis for the summary disposition sought by the government in the instant case. As appellants have shown in No. 74-1302, the posture in which the *NICOA* case arose and was disposed of by

the District Court and this Court render its precedential value suspect. That decision is additionally suspect because the motion to affirm filed by the Solicitor General in *NICOA*, and upon which he now relies to support his motion in the instant case, seriously misrepresents the obligations imposed upon mine operators by the legislation in question.

In its *NICOA* motion to affirm (pp. 8-9), the government represented to this Court that

> The Act contains a statute of limitations. A claim must be filed "within three years of the discovery of total disability due to pneumoconiosis or, in the case of death due to pneumoconiosis, the date of such death." Section 422(f)(1), 30 U.S.C. (Supp. II) 932 (f)(1) [footnote omitted]. Because employer liability can arise only with respect to claims filed on or after July 1, 1973, the Act does not create employer liability where total disability was discovered or death occurred prior to July 1, 1970. The 1969 Act was enacted six months earlier, on December 30, 1969, and there is therefore no possibility of an authorized claim involving total disability discovered, or death which occurred, prior to the date of original enactment.

What the government did not tell this Court is that it consistently has taken the position that claims filed during the period June 30, 1973 to December 31, 1973 are not subject to the Act's statute of limitations. Nearly 18,000 of such claims had been filed by the end of November, 1973,* and no doubt many more were filed before this six

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* Deposition of Nancy Snyder, Director of the Division of Coal Mine Workers' Compensation, Department of Labor, taken on December 4, 1973, and filed of record in this case in the District Court, p. 57. Appellants are prepared to show that some 80% of the claimants tentatively determined by the Department of Labor to be eligible for benefits payable by Appellants were born during the period 1880 to 1912, and that the vast majority of these claimants left mining employment in the 1940's and 1950's.

month period expired. The motion to affirm in the *NICOA* case also inaccurately portrays the economic burdens placed on mine operators by the Act. In its *NICOA* motion the government told this Court that operator benefits liability would terminate in 1981. (*NICOA* motion to affirm p. 6). The government did not tell this Court that the Department of Labor consistently has taken the position that operators are liable for payment of life-time benefits to eligible claimants, and that the Department requires operators, or their insurance carriers, to establish and maintain security reserves in connection with such benefits in amounts sufficient to secure payment for lifetime, not just until 1981.

2. The government's assertion in the instant motion (pp. 2-3) that the Act reaches only cases of disability due to occupational disease which becomes "manifest" after the effective date of Act, and that liability is imposed on operators only ". . . for injuries discovered or occurring after the date of its passage", amount to little more than a catch-22 argument. In this law Congress has, by legislative *fiat*, invented a disease unknown to medicine, given it the name of a true, medically recognized, disease, and defined it as disabling in circumstances where it is not disabling. Congress achieved this end through the use of arbitrary definitions and presumptions that have no valid foundation in medicine, and that compel diagnosis of occupational disease and disability where it does not exist in reality. Of course such cases of "disease" and "disability" could only be "discovered" after passage of the law and through application of its diagnostic parameters. If, prior to passage of the law, these cases had been presented to medical experts unfettered by such artificial definitions and presumptions, they would not have been so diagnosed, just as they would not be so diagnosed today if viewed

outside the context of an application for benefits under the Act. As it stands, the legislation in question is only slightly less arbitrary than it would be had Congress merely decreed that it is to be conclusively presumed that all retired mine workers who have worked in mining for a given number of years are totally disabled by occupational disease, and that their former employers must pay them a monthly stipend. Appellants believe that the Constitution protects them from such legislative arbitrariness, no matter how elaborately it may be fitted out in the familiar language and forms of genuine workmen's compensation legislation.

CONCLUSION

For the foregoing reasons, the motion of the Appellees to affirm Paragraph 3 of the judgment of the District Court should be denied.

Respectfully submitted,

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